DePaul Law Review

Volume 25
Issue 3 *Spring 1976*

Article 7

Child Support: His, Her or Their Responsibility? Plant v. Plant, Hursh v. Hursh

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CHILD SUPPORT: HIS, HER, OR THEIR RESPONSIBILITY?

Parental child support obligations have become a matter of increasing public concern, with the primary emphasis to date focused upon the problem of locating an absent parent and forcing him or her to contribute support monies.[1] Much less attention has been directed to the underlying questions of the nature and extent of each parent's support duty and the relative parental support obligations.[2] In the United States, the traditional common law rule for allocating support duties between the parents is two-fold. The father's support obligation is primary, while that of the mother is secondary, arising only upon the death or incapacity of the father.[3]

At one time Illinois clearly followed the traditional rule of primary and secondary obligations.[4] Recently, however, two Illinois appellate courts have concluded that the traditional rules no longer apply. Each court has held that parents are jointly and severally[5] obligated to sup-

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1. *See, e.g.*, Zumbrun & Parslow, *Absent Parent Child Support: The California Experience*, 8 FAMILY L.Q. 329 (1974); Gorner, *The Child Support Dilemma*, Chicago Tribune, Sept. 22, 1975, §3, at 1, col. 1, *continued at* Sept. 23, 1975, §3, at 1, col. 4; Sept. 24, 1975, §3, at 1, col. 1; Sept. 25, 1975, §3, at 3, col. 1. The major state legislation to date has been the Revised Uniform Reciprocal Enforcement of Support Act, the Illinois version of which appears in ILL. REV. STAT. ch. 68, §§101-42 (1975). Recently-enacted federal legislation provides for the assignment of welfare recipients' child support claims to the state for collection, federal incentive payments to states which set up collection programs meeting specified criteria, and a parent locator system which is also available to non-welfare recipients. *See* 42 U.S.C. §§651-60 (Supp. IV, 1974).

2. The term "relative parental support obligations," as used herein, refers to each parent's individual obligation, as related to that of the other parent.

3. H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 187-88, 488-89 (1968). In 1968, 44 states and the District of Columbia adhered to the rule of primary/secondary obligations. United Nations Commission on the Status of Women, *Parental Rights and Duties, Including Guardianship*, U.N. Doc. E/CN.6/474/Rev. 1 at 51 (1968).

4. Plaster v. Plaster, 47 Ill. 290 (1868), is the leading Illinois case stating this rule. *Accord*, Harding v. Harding, 180 Ill. 481, 54 N.E. 587 (1899); Johnson v. Johnson, 239 Ill.App. 417 (1st Dist. 1926); Bishop v. Prudential Ins. Co. of America, 217 Ill.App. 112 (1st Dist. 1920); Parkinson v. Parkinson, 116 Ill.App. 112 (4th Dist. 1904). The primary/secondary distinction was later codified in the Uniform Support of Dependents Law, Law of July 25, 1949, §3, [1949] Ill. Laws 1192-93. Section 3 of the 1949 session laws was codified as section 52 of chapter 68 and will hereinafter be referred to as section 52. In 1969, the legislature enacted the Revised Uniform Reciprocal Enforcement of Support Act, now ILL. REV. STAT. ch. 68, §§101-42 (1975), at which time it repealed the entire 1949 Act including section 52. P.A. 76-1090 (Aug. 28, 1969). However, the 1969 Act did not include a section dealing with support obligations, and no other statute is exactly on point.

5. For a more complete discussion of this term and problems associated with applying it to the relative parental support obligations, *see* notes 46-48 and accompanying text *infra*.

port their children, and that each parent's contribution should be based upon his or her ability to pay.[6] In *Plant v. Plant*,[7] the court denied a mother any retroactive allowance for support rendered after issuance of a separate maintenance decree, but during a period when the father was incapacitated and without assets.[8] *Hursh v. Hursh*[9] overturned a trial court ruling that a divorced mother, who was earning more than the father who had custody, did not have to contribute any future child support monies.[10] This Comment will analyze and explain these two decisions and the new joint and several support obligation of Illinois parents.[11]

Plant AND *Hursh*

Both the *Plant* and *Hursh* opinions examined several statutes before turning to prior judicial decisions concerning child support duties. The

6. Plant v. Plant, 20 Ill. App.3d 5, 312 N.E.2d 847 (5th Dist. 1974); Hursh v. Hursh, 26 Ill.App.3d 947, 326 N.E.2d 95 (1st Dist. 1975).

7. 20 Ill.App.3d 5, 312 N.E.2d 847 (5th Dist. 1974).

8. The 1967 separate maintenance decree awarded the mother custody, but made no provision for support. The father was without assets, unemployed, and hospitalized for alcoholism. Mrs. Plant supported the child thereafter, at a cost of approximately $3,100 per year. In 1972, the father inherited $40,000, shortly after which he was declared incompetent and a conservator of his estate was appointed. The mother then filed a petition seeking future support payments of $40 per week, and a recovery of $5,200, representing one-half of the past support expenses. The trial court granted future support of $35 per week, a total of $1,820 per year, but denied recovery for any of the past support expenses. The only issue on appeal was the denial of past support.

9. 26 Ill.App.3d 947, 326 N.E.2d 95 (1st Dist. 1975).

10. At the time of the Hursh divorce, the mother was given custody of the child and the father was ordered to contribute $50 per week as child support. Mr. Hursh obtained custody in 1973 and shortly thereafter petitioned the court for an order directing his ex-wife to contribute an equitable amount for child support. Upon learning that Mr. Hursh earned approximately $16,000 per year, the trial judge denied the petition. Although further evidence showing that Mrs. Hursh earned almost $20,000 per year was introduced, the judge persisted in the denial, saying "You take it up to the Appellate Court and let them prove that the wife should contribute if she is making more money." *Id.* at 949, 952, 326 N.E.2d at 96-97, 98. The appellate court found the statement indicative of the trial court's position and reproduced it twice in the opinion.

11. Both *Plant* and *Hursh* were concerned with the civil support obligations of parents, and this Comment will deal only with the duties imposed by civil law. Nevertheless, the criminal law is also designed to enforce minimal parental support duties. *See* criminal statutes listed in notes 23 and 27 *infra*. The authorities agree that enforcing civil support obligations, which are designed to obtain needed parental support, is preferable to imposing criminal sanctions which are designed to punish parents for non-support. *See, e.g.*, CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 19 (1968), *reprinted at Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., 164 (1970); Zumbrun & Parslow, *supra* note 1, at 332.

Hursh court adopted the "plain meaning"[12] approach to statutory interpretation. Upon examination of the divorce[13] and temporary support[14] statutes, the court found references to "parties" and "parents" in the plural. Thus, the statutes mandated consideration of both parents' assets. There was "no statutory justification for placing a greater burden for the support of the children on the father than the mother."[15] The trial court, which had based its denial of future support solely upon the earnings of the father, had abused its discretion when it "failed to consider the circumstances of all the parties as required by the statute."[16]

The statutory analysis in *Hursh* presents problems, however, because the court went beyond the conclusion of abuse of discretion[17] to hold the divorced parents jointly and severally liable for support. The statutes were said to clearly treat both parents alike or equally.[18] This is true insofar as the statutes mandate consideration of both parents' assets. However, the statutes, both on their face and viewed in their historical context, do not relate to the proper allocation of the relative parental support duties.[19] That question has been left to other statutes[20] or case

12. Courts taking this approach seek to arrive at the literal or obvious meaning of statutory language. 2A C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION §§46.01, 46.02 (4th ed. 1973). Sands criticizes some courts which claim to be applying this approach when interpreting a statute, the meaning of which is not clear. Such criticism is not applicable to *Hursh*. The only logical interpretation of the plural language used in the statutes in question is that it refers to more than one person. *See* notes 13 and 14 *infra*.

13. ILL. REV. STAT. ch. 40, §19 (1975). It states in part: "When a divorce is decreed, the court may make such order touching the . . . support of the children . . . as, from *the circumstances of the parties* and the nature of the case, shall be fit, reasonable and just . . . ." (emphasis added).

14. ILL. REV. STAT. ch. 40, §14 (1975). It states in part: "The court may, . . . during the pendency of the suit . . . make such provision for the education and maintenance of the child or children . . . out of *the property of either or both of its parents* as equity may require . . . ." (emphasis added). This statute was not applicable to the facts of *Hursh* because the parties were already divorced. The court probably included it to show a general legislative pattern requiring consideration of the assets of both parties in reaching support allocation decisions.

15. 26 Ill.App.3d at 950, 326 N.E.2d at 97.

16. *Id.* at 952, 326 N.E.2d at 99.

17. It might be argued that the only holding in *Hursh* was that the trial court had abused its discretion. That would seem sufficient to support the reversal and remand. Nevertheless, the court clearly stated that there were two issues to be decided, the first of which was whether divorced parents share financial responsibility for child support. *Id.* at 948, 326 N.E.2d at 96. The court decided the responsibility issue before discussing abuse of discretion.

18. *Id.* at 950, 326 N.E.2d at 97.

19. The provision governing child support was enacted in its present form in 1827 and has not been changed. *See* Act Concerning Divorce, Law of June 1, 1827, §6, [1827] Ill. Laws 181-83. It was in effect throughout the period when the traditional pri-

law.[21] The legislative mandate to consider the assets of both parents can be fulfilled regardless of whether the allocation of parental duties is primary and secondary[22] or joint and several. Thus, the statutes cited in *Hursh* do not lead inexorably to the court's conclusion of joint and several liability with contributions according to financial ability. There remains an unexplained gap between the statutory support offered and the conclusion which the court reached.

The statutory analysis in *Plant* suffers from a slightly different defect. The court cited seven Illinois statutes[23] as indicative of the fact that the common law support rules had become outmoded.[24] In effect, the *Plant*

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mary/secondary distinction in support duties was the firmly established law of Illinois. *See* note 4 *supra*. Yet now, the same language is used to support the *Hursh* conclusion of joint and several parental obligations. *See* ILL. REV. STAT. ch. 40, §19 (1975).

20. The only Illinois statute on point was Law of July 25, 1949, §3, [1949] Ill. Laws 1192-93 (repealed 1969), discussed in note 4 *supra*. While the statute was in force, the Attorney General of Illinois described it as containing the "general duties of support in Illinois." 1962 OP. ATT'Y GEN. 241. Because section 52 (formerly section 3) has been repealed, no substitute has been enacted, and no other statute is directly on point, the legislature has left the matter open for judicial consideration.

21. The only Illinois cases specifically on point are dated and the rule of primary and secondary liability followed therein was rejected in both *Plant* and *Hursh*. *See* cases cited in note 4 *supra* and discussion of more recent cases in notes 34-43 and accompanying text *infra*.

22. One of the clearest examples of the consistency of the primary/secondary distinction with a consideration of both parents' assets appears in the recent Missouri Dissolution of Marriage Act. The child support section, MO. ANN. STAT. §452.340 (Supp. 1976), lists six factors to be considered in fixing the amount of awards. First on the list is "The father's primary responsibility for support of his child." The financial resources of both the custodial and non-custodial parent appear later in the list of factors to be considered.

23. The court, in reaching its decision, relied on ILL. REV. STAT. 1973. The citations to ILL. REV. STAT. 1975 herein remain substantially the same.

The cited statutes may be divided into three categories. First are current statutes which impose civil support duties on parents: ILL. REV. STAT. ch. 3, §132 (1975) (parental right to custody); *id.* ch. 23, §2-11 (legally responsible relatives in relation to public aid); *id.* ch. 40, §19 (support in divorce); *id.* ch. 68, §15 (family expenses). The second category consists of current statutes which impose criminal sanctions for non-support: *id.* ch. 23, §2361 (misdemeanor of contributing to dependency or neglect of a child); *id.* ch. 68, §24 (non-support of children is a misdemeanor). Finally, the court cited two subsections of a repealed statute which dealt with persons legally liable for support of dependents. *See* Law of July 14, 1955, §3(a)(b), [1955] Ill. Laws 1999-2000 (repealed 1969). During the period this section was in force, it was codified in chapter 68, §52.

24. The *Plant* opinion does not clearly identify what common law rule the court had in mind. It referred to the "traditional view that support of a child is exclusively a husband's obligation and that a wife's income, assets and ability to provide for a child are irrelevant." 20 Ill.App.3d at 8, 312 N.E.2d at 850. This was the earliest common law rule, predating the primary/secondary distinction which is now the prevalent rule in the United States. However, Illinois adopted the primary/secondary distinction in 1868, and the *Plant*

court implied that the statutes were an expression of legislative desire to modify the common law rules. There is, however, nothing in the history of the cited statutory provisions to indicate that such was the legislative intent.[25] Instead, six of the statutes[26] are similar to the statutes cited in *Hursh*. They simply do not deal with the proper allocation of the relative parental support duties.[27] Further, the remaining statutory citation[28] lends no additional support to the court's conclusion of joint and several liability with contributions according to ability. It was to two subsections of a statute, since repealed, which codified the common law rule of primary and secondary liability.[29]

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opinion shows awareness of changes since that time. Therefore, this Comment assumes that *Plant* rejected the primary/secondary distinction in support duties. If that is not so, the *Plant* court was laboring under a grievous misconception and attempting to overturn a common law rule which had not existed in Illinois for over 100 years.

25. The six current statutory provisions cited in note 23 *supra* were all originally enacted between 1827 and 1915. The Illinois legislature did not take any steps to remove the common law disabilities of married women, including mothers, until 1861, when a married woman was first allowed to hold and retain her separate property. An Act to Protect Married Women in Their Separate Property, Law of Feb. 21, 1861, §1, [1861] Ill. Laws 143. The comprehensive Act of 1874, which equalized property rights between spouses, remains in substantially similar form in ILL. REV. STAT. ch. 68, §§1-21 (1975). However, by 1874 Illinois had adopted the primary/secondary distinction in support duties and that distinction persisted unchallenged for some time after 1915. *See* cases cited in note 4 *supra*.

26. *See* current statutes listed in note 23 *supra*.

27. There are other statutes, not cited in either *Plant* or *Hursh*, which also fall in this category, including the following which impose civil support duties: ILL. REV. STAT. ch. 23, §10-2 (1975) (legally responsible relatives in relation to public aid); *id.* ch. 23, §5005.1 (liability for care furnished children by the Dept. of Children and Family Services); *id.* ch. 37, §§701-14, 707-4 (liability for support under the Juvenile Ct. Act); *id.* ch. 68, §22 (support in separate maintenance); and *id.* ch. 106 ¾, §§52, 59, 59(a) (support of illegitimate children). *Id.* ch. 23, §2359 (child abandonment as a felony), a criminal statute, also applies to both parents.

28. Law of July 14, 1955, §3(a)(b), [1955] Ill. Laws 1999 (repealed 1969), codified as ch. 68, §52.

29. *Id.* After the 1955 amendment, section 52 contained seven subsections, only the first five of which are relevant to parental child support duties. Subsections (a), (c) and (d) stated that parents were severally liable for support of their children. Subsection (b) dealt with the mother's obligation and imposed child support duties on her when the father was dead, could not be found, or was incapable of providing support. Subsection (e) specifically stated that a divorced father was liable for the support of any dependent child of the marriage. Although the 1955 amendments made substantial changes in section 52, the relevant portions of subsections (b) and (e) were not altered. *See* Law of July 25, 1949, §3(b)(d), [1949] Ill. Laws 1193 (repealed 1969).

The court failed to note that section 52 was in force when the *Plant* separate maintenance decree was entered in 1967. *See* note 8 *supra*. From then until section 52 was repealed in 1969, the relative parental support duties, as imposed by statute, were primary

Despite the citations in *Plant* and *Hursh*, there are currently no Illinois statutes dealing with the allocation of parental support duties.[30] The legislature has either not considered the question, or has not been moved to enact its judgment on the matter into positive law.[31] Thus, the allocation of the relative parental support duties has been left to the judiciary.[32] The *Plant* and *Hursh* courts apparently realized this, for both sought guidance from case law, in addition to the statutes.[33]

Both courts relied heavily upon *Purity Baking Co. v. Industrial Commission.*[34] In that case, the issue before the Illinois Supreme Court was whether, for the purpose of awarding death benefits under the Workmen's Compensation Act,[35] a mother had a legal obligation to support her minor child. In holding that the mother was so obligated, the supreme court discussed changes in the legal status of mothers. It also said that "since the wife has become emancipated and now possesses the full enjoyment of her property and earnings there is no longer any reason why she should not be held legally responsible for the support of her

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and secondary. The citation to parts of section 52 not only failed to support the conclusion of joint and several parental obligations, it also ignored the express statutory imposition of the primary/secondary distinction during part of the period for which the mother was seeking recovery. This does not mean, however, that the *Plant* court's ultimate denial of the retroactive support request was erroneous. Applying the primary/secondary distinction to the facts in *Plant*, the court would probably have concluded that the father was incapable of providing the child's support during the period in question, thus obligating the mother to do so.

30. *See* current statutes cited in notes 13, 14, 23, and 27 *supra*.

31. Indeed, the last time the legislature definitely considered parental support duties was in 1955, when it amended section 52. *See* note 29 *supra*. The 1969 repeal of that section was an equivocal act at best. The entire statute of which it was a part was repealed to make way for a new Uniform Act. *See* note 4 *supra*. In doing so, it is possible that the legislature consciously intended to abandon the primary/secondary distinction. It is equally possible, however, that the legislature was concerned only with enacting a statute which appeared to provide a better procedure for interstate enforcement of support decrees. It may have given no thought to whether a specific section of the old act, about to be repealed, served any function not covered in the new act.

32. The legislature has, however, directed the courts to make proper provisions for the children in all divorce cases. *See* ILL. REV. STAT. ch. 40, §19 (1975). While it is possible that this could be done on an ad hoc, case-by-case basis, the results would be more understandable and consistent if there were general guidelines on such matters as apportionment of child support duties between the divorced parents.

33. Neither opinion explained the courts' views on how the statutes and case law fit together, although the *Plant* opinion stated that both modern case law and statutes indicate that the common law rule is outmoded. 20 Ill.App.3d at 8, 312 N.E.2d at 850.

34. 334 Ill. 586, 166 N.E. 33 (1929).

35. The current version of the statutory requirement at issue in *Purity Baking* is found in ILL. REV. STAT. ch. 48, §138.7(a) (1975).

minor children equally with her husband."[36] Some authorities have interpreted this broad statement as a general equalization of the support duties of Illinois parents.[37] Both the *Plant* and *Hursh* courts relied upon this broad statement in deciding the relative parental support obligations.[38] Yet, *Purity Baking* did not involve allocating child support duties between parents. It only dealt with the abstract support obligation of a mother, in relation to a third party's obligations under the Workmen's Compensation Act. As such, *Purity Baking* stands for the general proposition that as between parents and third parties, parental duties are equal. It had no effect upon the previously established primary/secondary distinction in relative support duties.[39] Therefore, *Purity Baking* is not directly applicable to the issue raised in *Plant* and *Hursh*. It would, however, furnish a useful analogy upon which the courts could draw in allocating the relative parental support duties.[40]

Aside from the analogy which can be drawn from *Purity Baking*, *Harnois v. Harnois*[41] is the cited case most relevant to the issue in *Plant*

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36. 334 Ill. at 588, 166 N.E. at 34.

37. *See* Clow v. Commissioner, 1 T.C. 928, 930-31 (1943); 27 ARK. L. REV. 157, 159 (1973).

38. 20 Ill.App.3d at 9, 312 N.E.2d at 850; 26 Ill.App.3d at 950-51, 326 N.E.2d at 97.

39. For another writer who has argued in favor of this interpretation of *Purity Baking*, *see* Rothe, *Taxability of Parents on the Use of Trust Income by or for Their Children*, 48 ILL. B.J. 438, 448-50 (1960). This view of *Purity Baking* is further supported by cases decided thereafter. Although Hoover v. Hoover, 307 Ill.App. 590, 30 N.E.2d 940 (1st Dist. 1940), repeated the broad statement of *Purity Baking*, it was dicta. The issue was whether an original alimony award included money for child support, and that issue was decided by interpreting the language of the former decree. Girls Latin School v. Hart, 317 Ill.App. 382, 46 N.E.2d 118 (1st Dist. 1943), which contains the same type of equality language as *Purity Baking*, was a suit by a third party to recover educational expenses from a mother. The first case to actually consider the relative support obligations of parents was Kemp v. Kemp, 332 Ill.App. 432, 75 N.E.2d 385 (1st Dist. 1947). In *Kemp*, the same court which had decided *Hoover, supra*, and *Girls Latin School, supra*, expressly stated that the primary support obligation rested upon the divorced father if he was able to provide for his children. 332 Ill.App. at 435-36, 75 N.E.2d at 386. The *Kemp* court did not mention *Purity Baking*, and relied on earlier cases establishing primary/secondary support duties. *Kemp* can be harmonized with *Purity Baking* if the equal responsibility statement in *Purity Baking* was only intended to apply to situations involving third parties.

40. Neither the *Plant* nor *Hursh* opinions indicate how the court was using the cases cited. If the justices intended to draw an analogy between the support duties in *Purity Baking* and those in the instant cases, they did not articulate that intent.

41. 10 Ill.App.3d 1062, 295 N.E.2d 511 (1st Dist. 1973), *cert. denied*, 415 U.S. 948 (1974). Both *Plant* and *Hursh* cited this case. The only other case cited by both courts was Edwards v. Edwards, 125 Ill.App.2d 91, 259 N.E.2d 820 (4th Dist. 1970), which states the rule that the financial circumstances of both parents should be considered in fixing support awards. As discussed in notes 19-22 and accompanying text *supra*, that requirement has no effect on the allocation of relative parental support duties. Other cases cited in

and *Hursh*. In *Harnois*, the First District Appellate Court modified a child support order with the effect that the parents, who had similar incomes, were each obligated to contribute one-half of their daughter's college expenses.[42] In so doing, the court dealt only with the facts of the case and did not attempt to explain the theory used to reach its decision.[43]

Harnois was an important step in the development of the law governing child support obligations in Illinois because it indicated the willingness of one court to treat one set of similarly situated parents equally. Nevertheless, holding that one particular set of parents should bear equal child support obligations is not the same as establishing a general rule that all parents are jointly and severally liable for the support of their children, with contributions based upon ability. There is a substantive change in emphasis when the courts establish a new rule of law. *Plant* and *Hursh* did indeed establish a new rule, but neither court acknowledged that it had moved beyond the previous law.

This lack of clear articulation in the courts' reasoning and analysis is not the only problem presented by *Plant* and *Hursh*. Neither court completely laid to rest the primary/secondary distinction in parental support duties.[44] For instance, *Plant* contains language which could be

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Plant but not *Hursh* are: Everett v. Everett, 25 Ill.2d 342, 185 N.E.2d 201 (1962) (same holding as *Edwards, supra); In re* Estate of Weisskopf, 39 Ill.App.2d 380, 188 N.E.2d 726 (1st Dist. 1963) (decided during the period in which the 1955 version of section 52 was in effect, stated the primary/secondary distinction rule and held mother personally liable for support when father was dead). Additional citations in *Hursh* were to *Plant* and two cases stating the rule that there must be a change in circumstances before a child support order can be modified. Metcoff v. Metcoff, 4 Ill.App.3d 160, 280 N.E.2d 572 (1st Dist. 1972); Loucks v. Loucks, 130 Ill.App.2d 961, 266 N.E.2d 924 (5th Dist. 1971).

42. The trial court had ordered each parent to contribute one-half of the expenses, but placed a limit of $1,000 on the father's obligation. The appellate court removed the limitation, stating that the financial circumstances of the parents (mother's income $15,900, father's $14,700) were not so different as to justify a limitation on the obligations of one and not the other. 10 Ill.App.3d at 1068, 295 N.E.2d at 515.

43. The only authority cited by the *Harnois* court was ILL. REV. STAT. ch. 40, §19 (1969), which was essentially similar to ILL. REV. STAT. ch. 40, §19 (1975), discussed in notes 13 and 19-22 and accompanying text *supra*. *Hursh*, which was decided by two of the same justices who had decided *Harnois*, explained the former decision as one in which "this court approved the concept that parents with equal earning capacities should contribute equally to a child's education." 26 Ill.App.3d at 951, 326 N.E.2d at 98.

44. The *Plant* court characterized the traditional support rules as "outmoded," 20 Ill.App.3d at 8, 312 N.E.2d at 850, but did not specifically attempt to overrule the early cases which established the rules. This may be partly due to the fact that the earliest cases were Illinois Supreme Court decisions. *See* note 4 *supra*. Because the *Hursh* court determined that the cited statutes were "[c]ontrary to the common law and some ancient case law," 26 Ill.App.3d at 950, 326 N.E.2d at 97, it did not discuss the matter any further. As

used to perpetuate the common law rule in some cases.[45] In addition, the terms chosen to describe the new parental obligations might be confusing. "Joint and several" is a phrase normally used to describe contractual obligations involving third parties, not parental support duties.[46] In the context of relative parental support obligations, many of the traditional connotations of the term are not applicable to contributions based upon ability to pay.[47] If the phrase is retained, its special meaning in the area of child support obligations may need further explication.[48]

The most important defect in the *Plant* and *Hursh* opinions is the

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discussed in notes 19-22 and accompanying text *supra*, the statutes are compatible with either primary/secondary or joint and several parental support obligations.

45. The court began its analysis by stating "[W]e do not entirely agree with appellant's argument that in every case the father is primarily responsible for such support." 20 Ill.App.3d at 7, 312 N.E.2d at 849. What the court probably meant is that in some cases the father will bear the principal support obligation because of his superior financial capability. Unfortunately, however, the court's language might be interpreted to mean that the traditional rule is still applicable in some instances; the rule enunciated in *Plant* and *Hursh* might apply only to similar factual situations. The *Plant* and *Hursh* courts may not accept such a limitation, but the other districts in Illinois have not considered the question. In Needland v. Needland, 17 Ill.App.3d 803, 308 N.E.2d 651 (3d Dist. 1974), the Third District refused to consider a father's arguments in favor of equal parental support obligations because the record did not establish the mother's ability to contribute. The opinion gives no indication of how the court will rule on the issue when such ability is shown. As recently as 1970, the Second District stated in passing that the mother had "no duty to share" the burden of supporting the children. Webb v. Webb, 130 Ill.App.2d 618, 622, 264 N.E.2d 594, 597 (2d Dist. 1970).

46. "A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option." BLACK'S LAW DICTIONARY 972 (rev. 4th ed. 1968). The secondary definition also refers to "bond or note," "obligors," "obligee or payee," and "the creditor." Although obligor/obligee language is used in the Revised Uniform Reciprocal Enforcement of Support Act, *see* ILL. REV. STAT. ch. 68, §§101-42 (1975), the drafters of the Uniform Act specifically stated that support duties are to be determined by state law. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, Commissioners' Prefatory Note (1968 Rev. Act).

47. Between the parents themselves, if circumstances are such that one parent should assume the entire support obligation, the other parent's liability would be zero, not the total amount. In other circumstances, the liabilities would be proportional and neither parent would be individually liable for the entire amount. When third parties such as creditors seek to enforce parental obligations, however, joint and several is an adequate description. The third party should be able to recover from either or both parents if necessary and should have the same duties as to both. *See* ILL. REV. STAT. ch. 68, §15 (1975); Purity Baking Co. v. Industrial Comm'n, 334 Ill. 586, 166 N.E. 33 (1929).

48. There is an alternative term which does not require the theoretical distinctions of "joint and several." The obligations can be described as "equal," with contributions according to ability. This is the description recently chosen by the Pennsylvania Supreme Court when it overturned the traditional rules. Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974).

failure of both courts to clearly articulate their reasoning and provide a sound analysis in support of the results reached. In spite of this failure, both opinions leave the reader with the overall impression that justice was done. This is true as to the general rule stated, as well as to the specific facts involved in each case.[49] For that reason, the next portion of the Comment will attempt to further articulate a theoretical basis for joint and several parental support obligations, with contributions according to ability.

ARTICULATION OF THE BASIS

Both the statutes and recent case law must be examined to determine if the issue of relative parental support obligations has previously been decided. Once the court[50] determines that there is no recent law directly on point,[51] it is left with the primary/secondary distinction developed at common law. The original rationale supporting the rule, the common law legal disabilities of married women, no longer exists to justify preserving it.[52] Other rules which arose from the same common law disabilities of married women have been abandoned.[53] In this context, it is

49. In *Plant*, the father will contribute future support monies. *See* note 8 *supra*. Although the mother was forced to bear the entire support obligation for several years, she was clearly the only parent with ability to do so at the time. Allowing a recovery of the past support expenses would have significantly depleted the estate available for Mr. Plant's care and maintenance and hastened his placement on welfare. 20 Ill.App.3d at 10, 312 N.E.2d at 851. The court's resolution gives ample consideration to the needs of all involved, including mother, father and child.

The final result in *Hursh* is unknown at this point. However, a hearing at which the assets and abilities of each parent are considered should result in the non-custodial mother being ordered to contribute future support monies. This is especially so in light of her superior earnings. *See* note 10 *supra*.

50. In this section, "the court" is used as a generic term, referring to any Illinois court which considers the issue, unless the context indicates otherwise.

51. *See* discussion of statutes in notes 18-31 and accompanying text *supra* and of case law in notes 34-43 and accompanying text *supra*.

52. In *Purity Baking*, the Illinois Supreme Court noted this basis for the primary/secondary parental support obligations. In overturning that rule insofar as third parties were concerned, the court stated that the principal reason for it no longer existed. 334 Ill. at 588, 166 N.E. at 34. England has also recognized this fact and abandoned the common law rules in favor of a joint support obligation. United Nations Commission on the Status of Women, *Parental Rights and Duties, Including Guardianship*, *supra* note 3, at 51. *See also* P. BROMLEY, FAMILY LAW 266-67, 462-77 (4th ed. 1971).

53. *See, e.g.*, Guardians & Wards, Law of April 18, 1901, §4, [1901] Ill. Laws 216, *amending* Guardians & Wards, Law of June 25, 1883, §4, [1883] Ill. Laws 100 (the father's superior right to custody of a minor). This provision is now codified in ILL. REV. STAT. ch. 3, §132 (1975). Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960)—overturned the common law rule that only a husband could sue for loss of consortium.

particularly appropriate for the court to reevaluate the common law allocation of support duties in light of present day realities.[54]

Another state court which has recently considered relative parental support obligations described the primary/secondary distinction as "a fiction that the father is necessarily the best provider and that the mother is incapable, because of her sex, of offering a contribution to the fulfillment of this aspect of the parental obligation."[55] As evaluated by the realities of the 1970's, the "fiction" and the primary/secondary distinction suffer from the twin faults of overinclusiveness and underinclusiveness.[56] Fathers who are financially unable to support their children are included in the class of those primarily liable, while mothers who are financially able are excluded from it.[57] In addition, the traditional primary/secondary distinction does not recognize the modern trend toward equalizing the rights and responsibilities of men and women in the United States.[58]

By preserving a rule which embodies a broad assumption of a mother's incapacity to support her children, a court would be doing

54. In Dini v. Naiditch, 20 Ill.2d at 429, 170 N.E.2d at 892, the Illinois Supreme Court specifically recognized the propriety of such reevaluation by the courts. *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921).

55. Conway v. Dana, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974).

56. These terms are used throughout this section for convenience in the analysis. The concept may also be described by saying the classification overreaches or underreaches. *See* Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385, 387 (1976). Illinois courts, however, have not adopted any of these terms, but prefer to deal with the same legal arguments in terms of reasonableness. *Cf.* Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976).

57. Despite this fact, the best argument for preserving the traditional support duties is probably economic. In 1973 the trend toward increasing disparity in the median wages of fully employed men and women continued, with women earning only 56.6% of the wages earned by the comparable group of men. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU, *The Earnings Gap*, Table 1 (March 1975). The purported economic justification for the primary/secondary distinction is unconvincing for two reasons. First, the rule is inflexible and fails to allow for the growing number of families in which the mother's earnings may equal or exceed those of the father. Second, the argument assumes that the child support rules are the result of the economic conditions of society, not contributing causes of those conditions. Women in the labor force still encounter opinions that they are working only for pocket money. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU, *The Myth and the Reality* 1 (Rev. May 1974).

58. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. §206(d) (1970); Equal Credit Opportunity Act, 15 U.S.C. §§1691-1691(e) (Supp. IV, 1974). Article I, §18 of the Illinois Constitution, set out in note 64 *infra*, can also be viewed as an expression of current societal values in favor of equalizing rights and obligations. However, this Note will deal with it as a separate basis for the decisions. *See* notes 64-78 and accompanying text *infra*.

more than failing to heed the presently available economic and social data.[59] It would also be ignoring and demeaning the contributions which mothers have made to the support of their families in the past and which many are making today.[60] In the context of a divorce or separation, a custodial mother's contributions may be especially significant because the child support order entered against the father often provides inadequate monies[61] or is ignored by him.[62]

After acknowledging that the statutes and prior cases did not cover the point, the court could explicitly refer to these social and economic factors for assistance in determining what the law governing relative parental support duties should be. This method would lead to the same conclusion reached by the *Plant* and *Hursh* courts,[63] but the opinion

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59. The following recent data is collected in NATIONAL COUNCIL OF ORGANIZATIONS FOR CHILDREN AND YOUTH, AMERICA'S CHILDREN 1976: A BICENTENNIAL ASSESSMENT (1976), from the U.S. government publications cited therein. In 1975, over 2.6 million women who headed families were in the labor force. *Id.* at 55. Altogether, 14 million mothers, or 47% of all women with children under 18, were in the labor force. *Id.* at 53. 27.6 million children, 44% of all children under 18, had mothers in the labor force. *Id.* at 54. Most mothers work for financial reasons. *Id.* at 57. In husband-wife families, working wives account for 26% of the family income. *Id.*

60. In the context of Social Security benefits, the United States Supreme Court has recognized the impermissibility and impropriety of denigrating women's efforts:

> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. . . . But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

61. In a nationwide survey, judges noted that the support orders they entered were often inadequate because of other financial or family obligations or limited earnings of the father. Quenstedt & Winkler, *What Are Our Domestic Relations Judges Thinking?* ABA FAMILY LAW SECTION, Monograph No. 1 (1965). *See also* comments by David Linn, Associate Judge of the Circuit Court of Cook County, *reported in* Gorner, *Judges Become Accountants in Disputes over Payments*, Chicago Tribune, Sept. 23, 1975, §3, at 2, col. 4.

62. A study in Wisconsin reported that after one year only 38% of the fathers were in full compliance, while 42% were in total noncompliance, *i.e.*, they paid nothing. By the tenth year compliance had dropped to 13% and total noncompliance had risen to 79%. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 189-92 (1971), reporting and commenting on material previously published in Eckhardt, *Deviance, Visibility, and Legal Action: The Duty to Support*, 15 SOCIAL PROBLEMS 470 (1968).

There is some evidence that nonpayment is willful, and simply a result of lack of enforcement. When Los Angeles County, California, made a concerted effort to collect support payments during the month of December, 1971, a total of 557 fathers who were cited for nonpayment thereafter paid an additional $1,000,000. M. WINSTON & T. FORSHER, NONSUPPORT OF LEGITIMATE CHILDREN BY AFFLUENT FATHERS AS A CAUSE OF POVERTY AND WELFARE DEPENDENCE 21 (Rand Corp. Paper P-4665, Rev. 1974).

63. For a slightly different choice of terms to describe the parental obligations, *see* note 48 *supra*.

would better articulate and explain the reasons for the new rule. In addition, explicit consideration of the factors supporting the appropriateness of joint and several obligations in today's society would facilitate reevaluation, if necessary, in the future.

Although the foregoing analysis would be especially appealing to a court concerned with social justice as well as logic, it is not the only theoretical basis upon which an Illinois court could determine that both parents are obligated to support their children to the best of their respective abilities. Article I, section 18, of the Illinois Constitution[64] provides an independent and alternative basis for such a result. Pursuant to this equal protection provision, the Illinois Supreme Court has held that classifications based on sex are "suspect" in Illinois;[65] they must withstand "strict judicial scrutiny" to be upheld.[66]

The first step in the court's equal protection analysis would be to decide if the traditional classification of the father's support duty as primary, and the mother's as secondary, is based on sex.[67] The basic group whose support obligations are at issue is composed of all parents of either sex. The traditional rule uses the terms "mother" and "father" to divide this group of parents into two sex-specific subgroups.

64. "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts." ILL. CONST. art. I, §18.

65. People v. Ellis, 57 Ill.2d 120, 311 N.E.2d 98 (1974).

66. *Id.* at 132-33, 311 N.E.2d at 101.

67. The analysis herein is structured for a challenge to the primary/secondary distinction on its face, rather than as applied. Finding the traditional rule invalid as applied to a particular person would not lead to abandonment of it in favor of the joint and several obligation established in *Plant* and *Hursh*.

It should be noted that the father in *Hursh* did raise an equal protection argument under both the federal and state constitutions. Brief for Defendant-Appellant at 7, Reply Brief for Defendant-Appellant at 23, Hursh v. Hursh, 26 Ill.App.3d 947, 326 N.E.2d 95 (1st Dist. 1975). Unfortunately, the argument was not well-developed, and it is difficult to tell whether it was intended as a challenge to the rule on its face or as applied. The mother's brief argued that sex discrimination was not the true issue in the case and, further, that the trial court had not discriminated against the father. Brief for Plaintiff-Respondent at 13-15. The *Hursh* court did not discuss the constitutional issue on either level. The court's only reference to it appeared at the end of the opinion, which stated that the trial court's failure to consider the circumstances of all parties "was an abuse of discretion, denying the defendant [father] the equal protection of the laws of this state." 26 Ill.App.3d at 952, 326 N.E.2d at 99.

The common law basis of the primary/secondary distinction will present no particular problems to the analysis. Common law rules, as well as statutes, can deny the equal protection of the laws. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973) (common law rule giving only legitimate children a right to support from their natural fathers held a denial of equal protection to illegitimate children).

Then the support function is apportioned between the parents on the basis of the subgroup to which each has been assigned. This is done without regard to the fact that either parent may be able to adequately perform the support function, regardless of his or her sex.[68] The classification of parental duties is, therefore, not based upon the nature of the function to be performed[69] or actual ability, but upon the sex of the parent.

Once the court has determined that the classification is based on sex, it must consider whether there is any compelling state interest which justifies maintaining the distinction in support duties. The important state interest involved is insuring that children are adequately supported by someone other than the state.[70] The logical and legislative

68. *See* note 59 *supra*.

69. The significance of a classification based on function is suggested by Geduldig v. Aiello, 417 U.S. 484 (1974), which held that it is constitutionally permissible to exclude normal pregnancy from the conditions covered under a state disability insurance program. The Supreme Court noted that although only women can become pregnant, the condition was an objectively identifiable one with unique characteristics. *Id.* at 496 n.20. This suggests that, at least under a standard of review which is less than "strict scrutiny," it is permissible to treat a sexually unique condition or function in a unique manner. Ability to support a child, however, is not such a function.

Therefore, the primary/secondary distinction in support duties might even be subject to an equal protection attack in a state which has not declared sex a suspect classification. Such a challenge was launched against a Missouri version of the primary/secondary distinction, in which the assets of the mother need not have been considered and no support order could have been entered against a mother. Williams v. Williams, 510 S.W.2d 452 (Mo. 1974). However, the court refused to consider the constitutional issue because the statutes had recently been amended to remove the alleged defects, even though the primary obligation of the father was expressly retained. *See* note 22 *supra*. Although the relative parental support duties in each state are unique, Nebraska apparently follows the rule that the father's obligation is primary, regardless of the mother's assets. *See* Schneider v. Schneider, 188 Neb. 80, 195 N.W.2d 227 (1972). This version of the traditional rule appears to be more susceptible to an equal protection attack than a rule under which the assets of both parents are at least considered. *But see* Dill v. Dill, 232 Ga. 231, 206 S.E.2d 6 (1974), rejecting a father's due process and equal protection challenges to a Georgia codification of the primary/secondary distinction and finding a "fair and substantial" relation between the statutory provisions and the object of the legislation. The *Dill* court's finding was predicated on the existence of moral, social, economic and physical differences between the sexes, said to divide them into natural classes and justify different treatment. *Id.* at 233, 206 S.E.2d at 7, citing a prior opinion which relied on 24 AM. JUR.2d *Divorce & Separation* §21 (1966).

70. The interest in reducing the amount of monies needed for AFDC payments, by obtaining adequate parental support in lieu thereof, was repeatedly emphasized by members of Congress before the adoption of the recent federal child support legislation, 42 U.S.C. §§651-60 (Supp. IV, 1974). *See, e.g.*, S. REP. No. 93-156, 93d Cong., 2d Sess. (1974), *reprinted at* 1974 U.S. CODE CONG. & AD. NEWS 8133. The state of Illinois undoubtedly has a similar interest in requiring private parties to support their children, thereby avoiding the need to use state monies for that purpose.

choice of persons to discharge that support duty is parents.[71] The court's next inquiry would be directed to whether there is any compelling reason to divide the group into sex-specific subgroups with different obligations. An economic argument based on the generally superior earnings of males can be raised.[72] However, it is simply not compelling.[73] The rule creates a group of parents primarily liable for support, but does not in any way assure that those included in the group have ability to discharge the obligation imposed upon them. The state's goal of securing support is not effectively served by the classification scheme because it is both underinclusive and overinclusive in regard to the goal.[74] Upon examination, the sex-based primary/secondary distinction in parental duties appears to be a mere administrative convenience employed to avoid determining which parent is able, or most able, to provide the needed support.[75]

Since the primary/secondary distinction is not justified by any compelling state interest, it would deny the equal protection of the laws guaranteed by Article I, section 18, of the Illinois Constitution.[76] The only further question before the court would be allocation of parental

71. *See* statutes cited in notes 13, 14, 23 and 27 *supra*. The choice of parents as the group to bear the support obligation does not have to serve a "compelling state interest" because it is not based on a suspect classification and does not infringe any fundamental interest.

72. *See* note 57 *supra*.

73. Neither is the distinction in relative parental support duties "remedial" in nature, as was the property tax exemption upheld in Kahn v. Shevin, 416 U.S. 351 (1974), *discussed in* Note, *Tax Benefits for Widows, The Supreme Court's Attitude Toward Remedial Sex Legislation*—Kahn v. Shevin, 24 DEPAUL L. REV. 797 (1975). First, the distinction is not a product of statute, but of common law. Second, even if one assumes that there can be such a thing as "remedial" common law, the long history of the provision negates the argument of remedial intent. It developed as part of the common law system in which discrimination against women and mothers was rampant. The mere fact that the rule has persisted longer than some of the other rules developed at common law does not suddenly endow it with the purpose of cushioning the impact of economic discrimination against women. Research discloses no court opinion which has ever attempted to justify the distinction on such a basis.

74. *See* note 56 and accompanying text, and text accompanying note 57 *supra*.

75. Even the United States Supreme Court, which has never declared sex a suspect classification under the United States Constitution, and thus does not require a compelling state interest to justify sex-based classifications, has struck them down when they appear to be mere administrative conveniences. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (statutory presumption of a wife's dependency on her serviceman husband, but no similar presumption in favor of husbands of servicewomen); Reed v. Reed, 404 U.S. 71 (1971) (statutory presumption giving male relatives priority over females in the same priority class when appointing administrators of estates).

76. *See* note 64 *supra*.

support duties in view of that finding. Because the rule is derived from common law, not statute,[77] the court will not be faced with deciding whether invalidation or extension is proper.[78] The court would be able to strike down the primary/secondary distinction in its entirety and replace it with a rule for the allocation of child support duties which does not discriminate on the basis of sex.

BEYOND *Plant* AND *Hursh*

Even with an adequately articulated theoretical basis for joint and several parental child support obligations, there are at least two questions regarding the scope and content of the new parental duties which *Plant* and *Hursh* do not explicitly resolve. First, the opinions leave unanswered the question of whether married, as well as divorced and separated parents, are jointly and severally obligated to support their children. The extension involved seems reasonable.[79] If the primary/secondary distinction does not comport with the realities of the 1970's and denies equal protection of the laws, it suffers from these faults regardless of the parents' marital status. Therefore, all parents in Illinois should be jointly and severally obligated to support their children to the best of their ability.[80]

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77. *See* notes 18-32 and accompanying text *supra*.

78. For a brief discussion of the factors which courts have considered in deciding the invalidation/extension question *see* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 913-20 (1971). So far as the primary/secondary distinction in support duties is concerned, the invalidation/extension question would present several theoretical difficulties if it had to be resolved. First, if the distinction is viewed as imposing a detriment upon fathers, invalidation would be the logical result. However, this would leave each parent with the secondary obligation formerly imposed only upon mothers, and no primary obligor. Viewing the distinction as a benefit to mothers and extending it to fathers would also leave no primary obligor. A third possibility is to view the distinction as imposing a detriment on children by depriving them of full support from both parents. This view would seem to require extension of the father's primary duty to include the mother, thus giving two primary obligors and no secondary obligor, unless one is chosen from among other relatives. However, no Illinois statute imposes support duties on any relatives other than parents or spouses. *See* statutes cited in notes 13, 14, 23 and 27 *supra*. Rather than involve itself in these analytical difficulties, a court would be well-advised to abandon the primary/secondary language in favor of some other terminology to describe parental obligations.

79. It can be argued that *Plant* provides authority for holding married parents jointly and severally liable for support because the court made no particular attempt to limit its holding to separated parents. *See* 20 Ill.App.3d at 7-8, 312 N.E.2d at 849-50. The *Hursh* court, however, did limit its holding to divorced parents. *See* 26 Ill.App.3d at 951, 326 N.E.2d at 98.

80. However, the probability of a court specifically holding that married parents bear

The second question is whether this new obligation requires each parent to make a monetary contribution to his or her child's support. So far as married parents are concerned, the courts and society will undoubtedly allow them to continue making their own decisions regarding finances and division of labor.[81] The courts, however, will have to make these decisions for broken families. In doing so, they should be guided by the language in both *Plant* and *Hursh* which emphasizes the need to consider the facts and circumstances of each individual case.[82] The variations in factual situations are, of course, almost endless, and the circumstances in each case may also change over time.[83] Therefore, it may be impossible to establish any general rules regarding monetary contributions. Nevertheless, there should be some circumstances in which a parent will not be required to make a monetary contribution. An unemployed parent with no assets is one possible example.[84] Likewise, the parent with no marketable skills might be exempted from making a monetary contribution to support.[85] In some cases a contribu-

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a joint and several civil support obligation is extremely low. Unless there are violations of the criminal law, a court will normally refuse to intervene in the internal affairs of families which remain together. *See, e.g.*, McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953), in which the court denied a wife's request for money and other facilities well within her husband's means because she continued to live with him.

The legislature could adopt a statute declaring the joint and several duty of all parents to support their children. However, due to the policy of nonintervention, the only effect of such a civil statute would be upon society's traditional stereotyped conceptions about women and their proper place in the world. That in itself might be a legislative goal worth pursuing. *Cf.* Note, *supra* note 73, at 807; Note, *"A Little Dearer than His Horse," Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 260 (1971); Note, *Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles*, 24 HASTINGS L.J. 1191 (1973).

81. *See* note 79 *supra* on the policy of nonintervention.

82. 20 Ill.App.3d at 7-8, 312 N.E.2d at 849; 26 Ill.App.3d at 950-51, 326 N.E.2d at 97-98.

83. It is for this reason that child support orders are modifiable. *See* ILL. REV. STAT. ch. 40, §19 (1975).

84. This group would include parents such as Mr. Plant before his inheritance. *See* note 8 *supra*. After the inheritance, however, Mr. Plant had assets and would no longer be within this category. Such a parent could legitimately be required to make some contribution to support, as was Mr. Plant.

It is also necessary to recognize that some unscrupulous parents might attempt to qualify for the "protection" which this category provides to those without ability to make a monetary contribution. Thus, the courts will need to be wary of possible abuses associated with claimed inability. *See, e.g.*, Pencovic v. Pencovic, 45 Cal.2d 97, 287 P.2d 501 (1955), in which a father was spiritual head of a religious society which prohibited outside employment but which financed trips abroad, paid his gambling debts, and had paid his child support obligations in the past.

85. This category could include persons such as a mother who was over 45 and had

tion in the form of services might be acceptable in lieu of money.[86] If the courts of Illinois give careful attention to the facts of each case, there will be no absolute rule demanding that both separated parents make a monetary contribution to their child's support.

This result is consistent with the goal hopefully served by the joint and several parental support obligations created by *Plant* and *Hursh*. The new conception of parental duties, as further articulated herein, should enable the Illinois courts to adequately consider and protect the individual and legitimate interests of both mother and father, while still providing needed child support monies.

Lee Ann Conti

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never worked outside the home. A 25 year old, however, might legitimately be expected to acquire marketable skills within a reasonable period of time.

86. This might be especially appropriate in cases which involve pre-school children. There is a significant body of expert opinion stating that the quality of care and attention which an infant receives will profoundly affect his or her later growth and development. *See, e.g.*, B.L. WHITE, THE FIRST THREE YEARS OF LIFE (1975). Another group which could be included are custodial parents whose potential net earnings are so low that the costs of adequate substitute care would equal or exceed the potential earnings.